FILED
SEP 17 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,
Appellants,

v.

PURSUE, LTD.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION TO DISMISS OR AFFIRM

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Appellee, in the above styled case, moves this Honorable Court to dismiss the appeal herein on the grounds hereinafter set forth, or in the alternative to affirm the judgment sought to be reviewed on the appeal upon the grounds that it is manifest that the questions upon which the decision of this cause rest are so unsubstantial as not to need further argument, and/or the judgment rests on adequate statutory and constitutional principles.

STATEMENT OF THE CASE

Lawrence S. Huffman, an Appellant herein, on September 18, 1972 filed a Complaint in the Court of Common Pleas for Allen County, Ohio seeking abatement of CINEMA I THEATRE as a public nuisance under *Ohio Revised Code* §§ *3767.04* and *3767.06*. An Amended Complaint was filed on September 20, 1972.

On October 24, 1972 the Court of Common Pleas for Allen County, Ohio ordered the CINEMA I THEATRE closed as a public nuisance until hearing on a Permanent Injunction. *Ohio Revised Code* § *3767.04*.

On October 26, 1972 the operator (William H. Dakota) of CINEMA I filed a Civil Rights Action in United States District Court for the Northern District of Ohio, Western Division. Civil Case. No. 72-384.

On November 2, 1972, United States District Court Judge Walinski entered an Order granting a Temporary Restraining Order staying so much of the State Injunction "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing."

On November 7, 1972 a hearing was held in the Court of Common Pleas of Allen County, Ohio and continued the hearing until November 30, 1972.

On November 22, 1972, Appellant Huffman had served on the agent, servant and employee of the new theater operator, PURSUE, LTD. a copy of the Allen County Court Temporary Restraining Order of October 24, 1972.

On November 30, 1972, the Court of Common Pleas reconvened and heard evidence on the Permanent Injunction. Gilbert H. Deitch, Esquire, of the Georgia and Tennessee Bars, appeared in Court on behalf of the operator of CINEMA I, PURSUE, LTD., and was refused the right to speak or contest the evidence or argue the applicable law. It is incorrect, as stated on page 12 of Appellant's Jurisdictional Statement, to say that counsel was not present at the hearing. Counsel was present and was not permitted to participate in the proceedings on behalf of PURSUE, LTD., the operator of CINEMA I THEATER in Lima, Ohio.

On November 30, 1972, the Allen County Common Pleas Court granted a Permanent Injunction against the premises, declared it a public nuisance, and ordered all personal property sold at public auction and ordered it padlocked for one (1) year. Within two (2) hours after the entry of the Order, the theater was padlocked by law enforcement officials.

PURSUE, LTD., having been denied the right to appear in Allen County Common Pleas Court, and the theater being closed, filed a new proceeding in the United States District Court, with a request for a Temporary Restraining Order.

Counsel for Appellant Huffman, having been notified of the application for a Temporary Restraining Order, to be heard on the afternoon of December 1, 1972, and refusing to appear, the United States District Court issued a Limited Temporary Restraining Order.

On December 11, 1972 the chief judge of the Sixth Circuit Court of Appeals designated a statutory three-judge court.

The statutory three-judge court heard oral argument on March 12, 1973, counsel for all parties appearing.

On April 20, 1973 the Court issued its Opinion and Order (see Appendix A3 – A12 of Jurisdictional Statement).

On or about May 23, 1973 Appellants Huffman and Fair filed the following documents in this Court:

(a) Motion for Leave to File Petition for Writ of Mandamus or Prohibition, Petition for Writ of Mandamus or Prohibition, and Brief in Support Thereof (No. 72-1613);

(b) Motion to Advance Date Set for Filing of Briefs in Opposition to Petition;

(c) Application to Honorable Potter Stewart for Stay Order or Writ of Injunction. (Application A-1199)

On June 12, 1973 Justice Stewart denied Appellants' Application for Stay.

On June 25, 1973 Appellants' Application for Stay or Writ of Injunction, referred to the entire Court by Justice Stewart, was denied.

On August 14, 1973 Appellants filed a Jurisdictional Statement in this Court.

THE JUDGMENT OF THE STATUTORY THREE-JUDGE COURT BELOW RESTS UPON PROPER AND ADEQUATE STATUTORY AND CONSTITUTIONAL GROUNDS AND/OR NO SUBSTANTIAL QUESTION IS PRESENTED FOR REVIEW BY THIS COURT.

The Ohio trial court issued a permanent injunction on November 30, 1972 in a civil action instituted by Appellant

Huffman closing Cinema I Theatre. Said injunction was based upon evidence introduced by Huffman – 16 motion picture films – disseminated at Cinema I Theatre, Lima, Ohio by parties other than PURSUE, LTD. which Counsel for Appellee admitted at oral argument before the three-judge court.

Ohio Revised Code § *3767.04* permits the closure of a premises *pending* litigation and § *3767.06* permits permanent injunctive measures.

With regard to Appellants' claim that the Court below improperly interfered with state proceedings, it should be noted:

(1) the state proceedings were civil in nature;

(2) the Complaint filed in the Federal forum concerning Cinema I Theatre preceded the state court's final judgment;

(3) the judiciary of Ohio has authoritatively construed the statutory provisions at bar to permit that which the Court below found to be unconstitutional.

The Court below was properly convened, considering the substantial constitutional questions presented by Appellee. *Gossby v. Osser*, 409 U.S. 512 (1973)

The Court below did not improperly interfere with state proceedings. In *Gibson v. Berryhill*, ____ U.S. ____, 36 LEd.2d 488, 93 S.Ct. _____ (1973), this Court discussed the anti-injunction statute:

"28 USC § 2283 [28 USCS § 2283], the anti-injunction statue, prohibits federal courts from enjoining state court proceedings, but the statute

excepts from its prohibition injunctions which are 'expressly authorized' by another Act of Congress. Last Term, after the District Court's decision here, this Court determined that actions brought under the Civil Rights Act, 42 U.S.C. § 1983 [42 USCS § 1983], were within the 'expressly authorized' exception to the ban on federal injunctions. Mitchum v. Foster, 407 US 225, 32 L Ed 2d 705, 92 S Ct 2151 (1972)."

Respecting equity, comity and federalism, the Court further stated:

"As we expressly stated in Mitchum, nothing in that decision purported to call into question the established principles of equity, comity and federalism which must, under appropriate circumstances, restrain a federal court from issuing such injunctions. Id., at 243, 32 L Ed 2d 705. These principles have been emphasized by this Court many times in the past, albeit under a variety of different rubrics. First of all there is the doctrine, usually applicable when an injunction is sought, that a party must exhaust his available administrative remedies before invoking the equitable jurisdiction of a court. See, e.g., Prentis v. Atlantic Coast Line Co., 211 US 210, 53 L Ed 150, 29 S Ct 67 (1908); Illinois Commerce Comm'n v. Thomson, 318 US 675, 87 L Ed 1075, 63 S Ct 834 (1943). Secondly, there is the basic principle of federalism, restated as recently as 1971 in Younger v. Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971), that a federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances suggesting bad faith, harassment or irreparable injury that is both serious and immediate. And finally, there is the doctrine, developed in our cases at least since Railroad

Commission v. Pullman, 312 US 496, 85 L Ed 971, 61 S Ct 643 (1941), that when confronted with issues of corstitutional dimension which implicate or depend upor settled questions of state law, a federal court ought to abstain and stay its proceedings until those state law questions are definitely resolved."

The Court below was not confronted with enjoining a criminal prosecution; therefore, *Younger v. Harris*, 401 U.S. 37 (1971) did not require abstention; and further, any attempt to litigate the Ohio statutes through the state appellate process would have been futile in that the Ohio nuisance law at issue has been upheld by appellate courts of Ohio.

(a) *Keating v. a Motion Picture Film entitled "Vixen"*, 272 N.E.2d, 137 (1971);

(b) *Ewing v. A Motion Picture Film entitled "Without a Stitch,"* 276 N.E.2d 655 (1971);

(c) *Dowd v. a Motion Picture Film entitled "Pay the Babysitter,"* 31 O.Misc. 208 (1972).

The cases listed as (a), (b) and (c) above are under appeal to the Supreme Court of the State of Ohio. Clearly Appellants cannot seriously urge that Appellee herein can litigate its federal constitutional claim through the State Court Appellate system with due consideration to the extensive delay in the final adjudication of one's First Amendment rights. (See *Freedman v. Maryland*, 380 U.S. 51, (1965), wherein a delay of six months was condemned; and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, wherein a delay of four months was condemned.)

Most recently Chief Justice Burger, writing for a majority of the Court held that injunctive relief against dissemination of a particular motion picture film must await a final decision on appeal. *Paris Adult Theatre I v. Slaton*, ____ U.S. ____, 37 LED2d 446, 455 (1973)

> "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of Blount v. Rizzi, 400 US 410, 417, 27 L Ed 2d 498, 91 S Ct 423 (1971); Teitel Film Corp. v Cusack, 390 US 139, 141-142, 19 L Ed 2d 966, 88 S Ct 754 (1968); Freedman v Maryland, 380 US 51, 58-59, 13 L Ed 2d 649, 85 S Ct 734 (1965), and Kingsley Books, Inc. v Brown, supra, 354 US, at 443-445, 1 L Ed 2d 1469 (1957), were met. Cf. United States v Thirty-Seven Photographs, 402 US 363, 367-369, 28 L Ed 2d 822, 91 S Ct 1400 (1971) (opinion of White, J.)."

Also, in *Heller v. New York*, ____ U.S. ____, 37 LED2d 745 (1973) the Court ruled:

> "In United States v Thirty-Seven Photographs, 402 US 363, 28 L Ed 2d 822, 91 S Ct 1400 (1971), and Freedman v. Maryland, 380 US 51, 13 L Ed 2d 649, 85 S Ct 734 (1965), we held that 'because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint*.' 402 US, at 367, 28 L Ed 2d 822, quoting 380 US, at 58, 13 L Ed 2d 649 (emphasis added).
>
> Petitioner's reliance on the Court's decision in a Quantity of Copies of Books v Kansas, 378 US 205, 12 L Ed 2d 809, 84 S Ct 1723 (1964), and Marcus v Search Warrant of Property, 367 US 717, 6 L Ed 2d 1127, 81 S Ct 1708 (1961), is misplaced. Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid 'danger of abridgement of the right of the public in a free soceity to unobstructed circulation of non-obscene books.' Quantity of Copies of Books v Kansas, supra, 378 US, at 213, 12 L Ed 2d 809 (1964). We do not disturb this holding. Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of Quantity of Copies of Books and Marcus are fully met. *'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'* New York Times Co. v United States, 403 US 713, 714, 29 L Ed 2d 822, 91 S Ct 2140 (1971) quoting Bantam Books, Inc. v Sullivan, 372 US 58, 70, 9 L Ed 2d 584, 83 S Ct 631 (1963). Organization for a Better Austin v Keefe, 402 US 415, 419, 29 L Ed 2d 1, 91 S Ct 1575 (1971). Carroll v Comm'rs of Princess Anne, 393 US 175, 181, 21 L Ed 2d 325, 89 S Ct 347 (1968). See Near v Minnesota, 283 US 697, 75 L Ed 1357, 51 S Ct 625 (1931)." (Emphasis supplied)

A fortiorari, as the Court below ruled, the statutory system authorized in Ohio to close a theatre and enjoin dissemination of *any* motion picture films is repugnant to *First Amendment* rights of Appellee. The consistent rulings of this Court on impermissible prior restraints, as cited above in *Heller*, leave no room for doubt that the Court below was correct in its ruling.

CONCLUSION

Appellee, therefore, respectfully requests this Court on the basis of arguments set forth herein, to dismiss the appeal from the United States District Court for the Northern District of Ohio and/or in the alternative, to affirm that Court's judgment.

Respectfully submitted,

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